HR-83-015-CB

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARRMENT OF HUMAN RIGHTS

State of Minnesota, by Irene Gomez-Bethke, Commissioner, Department of Human Rights,

Complainant, ORDER REGARDING DISCOVERY

V.

Midway Hospital,

Respondent.

On August 29, 1983, the Respondent filed a written Motion seeking the pr@duction of certain documents by the Complainant as a part of the prehearing discovery in this case. On October 3, 1983, the Complainant filed a memorandum in Cpposition to the Motion. The Respondent filed a Reply to the Complainant's Memorandum on October 11, 1983. The Complainant filed two affidavits on October 13, 1983. The Respondent filed a letter on October 14, 1983.

Carl Warren, Special Assistant Attorney General, 1100 Bremer lbwer, Seventh Place and Minnesota Street, St. Paul, Minnesota 55101, represented the Complainant. Alice O'Brien Berquist and James M. Dawson, Attorneys at law, of the firm of Felhaber, Larson, Fenlon & Vogt, P.A., W-1080 First National Bank Building, St. Paul, Minnesota 55101, represented the Respondent.

Based upon the filings made and for the reasons set out in the Memorandum which follows,

IT IS HEREBY ORDERED that the Complainant shall:

1. Produce for inspection by the Respondent, all purely factual material contained in the documents in dispute where that factual material can reasonably be separated without compromising the privileged portions of the documents.

2. That intra-agency documents containing recommendations, evaluations, conclusions, mental impressions or legal theories of the Commissioner, her employees, or delegates are privileged and not discoverable.

3. That the Commissioner, or her delegates, shall submit an Affidavit to the Bearing Examiner to establish compliance with this Order on or before November 1, 1983.

Dated October 20, 1983.

GEORGE A. BECK
State Hearing Examiner

GPB:wf

MEM0RANDUM

Da June 7, 1983, Respondent, Midway Hospital, served upon the Cbmplainant its request for production of documents, which requested production of all documents contained in the Minnesota Department of Haman Rights' file relating to this case. In its reply of July 14, 1983, the Complainant allowed Midway to review all documents contained in the Agency file, except for certain documents she believed privileged or outside the scope of discovery. Reference to those disputed documents in this Memorandum will refer to the documents listed on page 2 through 10 of Cbmplainant's Memorandum in Opposition to Respondent's Motion. Approximately 18 documents are still in dispute.

The investigation of this case was conducted by the St. Paul Department of Human Rights pursuant to a work-sharing agreement authorized by Minn. Stat. 363.115. Fbllowing its investigation, the St. Paul Department made a report to the State Department which contained recommendations concerning the charge referred to it. The documents in dispute include several communications between the St. Paul Department and the State Department, some of which contain facts developed by the St. Paul Department. Some of these communications also contain the St. Paul Department's recommendations concerning the case and the impressions and conclusions of the investigator for the St. Paul Department Other documents in dispute include internal memoranda within the State Department, some of which give directions to employees. Other documents summarize interviews with witnesses, and others contain a discussion of settlement and a State Department investigator's conclusions as to the proper disposition of the case.

The Complainant has resisted production of these documents on two grounds; namely, that they are privileged as the work product of the Agency or its attorney, or that they are irrelevant to this proceeding. The Respondent has suggested that the Minnesota Government Data Practices Act requires disclosure of the documents in question. That Act generally provides that all data collected by a State agency is public unless classified by statute or temporary classification as private or confidential. Minn. Stat. 13.03, subd. 1. The Act is modified, however, in regard to investigative data by Minn. Stat. 13.39, which provides that data which is part of an active investigation retained in anticipation of a pending civil legal action is classified as confidential. The chief attorney acting for the State agency is given authority to determine when a civil legal action is pending. The chief attorney of the Human Righst Division of the Attorney General's office has determined that a civil legal action is pending before the Department of Human Rights once a charge is filed pursuant to Minn. Staat. 363.06, subd. 1 (1982). (Affidavit of Richard E. Varoo, Jr.)

Minn. Stat. 13.39 is, however, affected by Minn. Stat. 13.30, which prcvides that, notwithstanding other provisions of Chapter 13, the use and dissemination of data by an attorney acting in his or her professional capacity for a State agency, is governed by statute, rules and professional standards concerning discovery, production of documents, introduction of evidence and professional responsibility. The Agency file is now in the possession of its attorney, Vt. Warren. As the Respondent points out, the active investigation, referenced in 13.39, is now closed and the civil legal

action is at hand rather than anticipated. The rule governing discovery in

administrative contested case proceedings is 9 MCAR 2.214 C., which provides

that

> Upon the motion of a party, the hearing examiner may order discovery of any other relevant material or information, provided that the privileged work product (e.g., that of attorneys, investigators, etc.) shall not be discoverable. The hearing examiner shall also recognize all other privileged information or communications which are recognized at law.

Minn. Stat. 13.03, subd. 4, provides, in part, that:

> The classification of data in the possession of an agency shall change if it is required to do so to comply with either judicial or administrative rules pertaining to the conduct of legal acts . . . .

Even if 13.39 is interpreted to shield disclosure, this last statute provides the Hearing Examiner with authority to change the classification of data where necessary within the conduct of an administrative contested case. Subdivision 4 was added by Minn. Laws 1980, Ch. 603, to permit disclosure of data not generally available to the public or the subject, in the context of an administrative contested case proceeding.

This discovery question is then properly disposed of pursuant to 9 MCAR 2.214 C. which employs the same basic test as Rule 26.02 (3) of the Rules of Civil Procedure for the District Courts of the State of Minnesota. 9 MCAR 2.213 B. provides that in ruling on motions where the contested case rules are silent, the Hearing Examiner shall apply the Rules of Civil Procedure for the District Courts of the State of Minnesota, to the extent that it is apprqpriate to do so. Rule 26.02 (3) permits discovery of documents prepared in anticipation of litigation only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case, and that he is unable, without undue hardship, to obtain the substantial equivalent of the materials by other means. The Rule prohibits disclosure of the mental impressions, conclusions, opinions or legal theories of an attorney. The work product doctrine does not protect against disclosure of facts which are pertinent to the litigation. It does protect against discovery of documents prepared in anticipation of litigation. Thompson, 11 Minn. Prac.-Evidence, 501.05. The rationale of the "in anticipation of

litigation" restriction is that where an attorney or party does not envision litigation as a possibility, a fear of disclosure will not deter a full and adequate consideration of the problem. Hercules Inc. v. Exxon Corp., 434 F.Supp. 136, 151 (D.C.Del. 1977).

Tie Respondent argues that litigation cannot be anticipated by the Commissioner until a finding of probable cause is made. It suggests that the Commissioner is a neutral fact-finder in conducting her investigation until a finding of probable cause is filed. The future litigation, however, need only be a possibility. Hercules, supra, 434 F.Supp. at 151, United States v. Bonnell, 483 F.Supp. 1070, 1078 (D.C. Minn. 1979). In the case at bar, it appears clear that the fear of disclosure of documents prepared after a charge is filed but prior to a finding of probable cause might very well deter the Commissioner or her delegates from a full and adequate consideration of the

matter. Since the Human Rights Act is ultimately enforced through litigation, litigation is at least a possibility each time a charge is filed. Accordingly, both within the meaning of the work product doctrine and the Data Practices Act, it appears that civil litigation is reasonably anticipated as a possibility upon the filing of a charge in a Human Rights case.

The Respondent bases its argument in support of production of the requested documents on two federal cases, Smith v. Universal Services, Inc., 454 F.2d 154 (5th Cir. 1972) and Clark v. Atlanta University, Inc., 65 F.R.D. 414 (D.C. Ga. 1974). In Smith, the Court ruled that an EEOC investigator's report and findings of probable cause should be admitted in a Title VII suit between two private parties. In Clark, the Court denied a motion to strike from the defendant's answer a defense that the EEOC found no probable cause in the case. The Clark Court stated that the defense might be relevant based upon Smith. What the Court admitted into evidence in Smith, however, was not all of the documents contained in the EEOC file. It was the probable cause report issued by the EEOC which contained a statement of the charge, a summary of ':he facts developed from the investigation, and the determination of reasonable cause. 454 F.2d at 159. In compliance with the spirit of the Smith decision, the Complainant in this case has withdrawn her objection to document No. 8, which is an investigation summary, and document No. 10, which is a recommendation and determination regarding probable cause, and has included those documents in the file available to the Respondent. In another case cited by the Respondent, namely, Chandler v. Roudebush, 425 U.S. 840, 863 (1976), the Court notes the admissibility of prior administrative findings, but it was referring to a federal agency decision after an administrative hearing on whether or not a federal employee had been discriminated against.
In Blizard v. Fielding, 572 F.2d 13 (lst Cir. 1978), the probable cause determinations of the EEOC and a state commission were admitted into evidence. Again, these are documents similar to the document which has now been produced by the Cbmplainant.

A case more in point with the case at bar is that of Branch v. Phillips Petroleum Company, 638 F.2d 873 (5th Cir. 1981). In that case Phillps subpoenaed the non-party EEOC for all records related to any charge of discrimination filed by Branch. The EEOC withheld materials associated with the Commission's conciliation efforts, and intra-agency memoranda, reports and reco ndations. The Court found that the disclosure of factual material

related to the merits of a charge was appropriate. 638 F.2d at 881-882. It
also found, however, that intra-agency memoranda, reports of agents,
subordinate staff evaluations, and advisory recommendations were shielded from
discovery by an official or executive privilege because the disclosure would
be harmful to governmental interests. See, McCormick Handbook of the Law of
Evidence, 106-109 (2nd Ed. 1972); 8 Wigmore Evidence, 2378 (McNaughten
Rev. 1961); Carl Zeiss Stiftung v. E. B. Carl Zeiss, Jena, 40 F.R.D. 318, 324
(Dist. D.C. 1966) -aff'd 384 F.2d 979 (D.C. Cir. 1967); cert.den. 389 U.S. 952
(1967). The Branch court recognized that 'government officials would hesitate
to offer their candid and conscientious opinions to superiors or co-workers if
they knew that their opinions of the moment might be made a matter of public
record at some future date." 638 F.2d at 882. The Branch court summarized
its holding by stating that:

> To the extent that the documents withheld from Phillips by the Commission are internal working papers in which opinions are expressed, policies are formulated, and actions are recommended, they are privileged. Tb the extent that the documents contain purely factual material in a form that can be separated without compromising the privileged portions of the documents, the material is not privileged and is subject to discovery.
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> 454 F.2d at 882.

Such a disposition is appropriate for application to this contested case proceeding. State agencies are not without adequate protection against disclosure of their investigative files such that it would be harmful to the functioning of government. In addition to the executive privilege outlined in the Branch case, a statutory privilege exists to shield communications made to a public officer in official confidence when the public interest would suffer by --he disclosure. Minn. Stat. 595.02 (5). The agency must demonstrate, however, that the communication was intended to be held in confidence. Thompson, 11 Minn. Prac. Evidence, 501.08. Professor Thompson recognizes that the government must be careful, however, not to unnecessarily deprive a litigant of access to relevant facts. Given the substantial resources of the State, to permit the State to exclude relevant evidence in a suit it initiated could create an imbalance in the adversary system. Additionally, a privilege may exist for the identity of informants. Usery v. Ritter, 547 F.2d 528 (10th Cir. 1977); Brennen v. Engineered Products Inc., 506 F.2d 299 (8th Cir. 1974). A respondent is not entitled to discover directly what legal conclusions the party or its attorney will draw from the facts in a case. EEO? v. Otto, 75 F.R.D. 624, 627 (D.C. Md. 1976).

A balance must be maintained in the discovery process, however. Some commentators have even urged that the work product doctrine should not be applied to agency-prepared materials since the agency is acting for the public interest and the general purpose of disclosure is to help all participants to receive better public treatment. Bernard R. Adams, State Administrative Procedure: The Role of Intervention and Discovery in Adjudicatory Bearings, 74 N.W. Univ. L.Rev. 854 (Feb. 1980). This article suggests that disclosure should be presumed and the agency should have the burden of showing why disclosure should not be oredered. 74 N.W. Univ. L.Rev. at 875. It has also been suggested that in some administrative proceedings, the State may have a

duty to disclose any exculpatory information or evidence favorable or helpful to -,.he Respondent. Wegmann v. Department of Registration and Education, 377 N.E. 2d 1297, 1301 (Il. App. 1978); Brady v. Maryland, 373 U.S. 83 (1963).

The Federal 9th Circuit Court of Appeals has held that the Jencks Doctrine is generally applicable to all administrative proceedings. Great lakes Airlines, Inc. v. CAB, 291 F.2d 354, 364 (9th Cir. 1961), cert. den.; 368 U.S. 890 (1961). The Jencks Doctrine entitles criminal defendants to discovery of government witness statements, but only once a hearing has begun. Jencks v. United States, 353 U.S. 657 (1957). It can generally be said that courts are most likely to order discovery of witness statements, Martich v. Ellis, 427 N.E. 2d 876 (Il. App. 1981), and are less likely to allow discovery of investigative reports. Gregg v. Oregon Racing Commission, 588 P.2d 1290, 1294 (Ore. App. 1979).

The Respondent suggests that an inconsistency exists in a holding that the probable cause determination of the Department is discoverable but that the reports and recommendations of the St. Paul department are not. There is a significant difference, however. The recommendations of the St. Paul Department are preliminary conclusions which recommend a disposition to the Commissioner. Ps such, they fall within the executive or official information privilege. free and open communication is necessary to achieve unlitigated compliance with the State Human Fights Act. The St. Paul Department has the same relationship to the State Department as do the State Department's own employees for the purpose of discovery and the application of privileges. The prooable cause determination of the State Department is its final determination on that issue, however.

It is, therefore, ordered that the Commissioner produce the factual material contained in the approximately 18 documents in dispute. It need not disclose the mental impressions, conclusions, or legal theories of employees of either department. Although the Bearing Examiner has not examined the documents in question, it would appear that the memos on documentary evidence, the memo on settlement and the memo to the Commissioner containing an employee's conclusions, which are described as document No. 7, may be privileged. Similarily, document No. 11 and No. 12 and Nos. 17-23, would appear to contain recommendations, evaluations and conclusions which are privileged. Additionally, certain documents, such as No. 1, No. 5, No. 15 and Nos. 25 and 26, appear to be internal memoranda without factual material which provide directions concerning the conduct of the investigation or determination. If the documents are accurately described, they appear to be privileged. On the other hand, document No. 6 and the notes of interviews described under document No. 7 would appear to contain factual information subject to discovery. This discussion is not intended to prejudge the nature of the documents but only to illustrate bow the ruling in Branch might apply. The Department is directed to separate the factual information contained in all the documents from any evaluations or conclusions, and to produce that material for the Respondent. The Complainant is directed to make a good-faith attempt to separate facts and conclusions. Conclusions of an investigator in a summary may be blacked out Where necessary.

Tb the extent that that material can be described as work product of the Department, it is determined that the Respondent has shown a substantial need of these materials in the preparation of its case. The statement of the charging party or other witnesses may aid the Respondent in the preparation of its case and may contain evidence favorable to the Fespondent. It is clear under the Rules of the Office of Administrative Hearings that a party is entitled to any formal statement by a party or a witness. 9 MCAR 2.214 A.2. A party may not avoid this requirement by having its employee take notes of an interview instead of taping the interview for later transcription.

Although the Cbmplainant suggests that the Respondent is simply requesting the
fruits of its investigative efforts, it must be remembered that the fact gathering occurred in the public interest and its disclosure may promote a better hearing record and a more informed final decision.

G.A.B.